A

PP

v.

SALLEH ZAKARIA & ANOR

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: D-05-29-1997]

C

4 JANUARY 2010

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Presumption of trafficking - Dangerous Drugs Act 1952, s. 37(da) - Element of possession - Whether established -*

D *Whether custody and control of drugs proved*

This was an appeal by the prosecution against the decision of the High Court judge, who had acquitted and discharged both accused persons at the end of the prosecution's case. The first co-accused

E person (hereinafter merely referred to as Salleh Zakaria) did not appear before the court for the appeal. This court proceeded with the appeal against the second respondent (hereinafter referred to as the respondent). The facts were that the respondent had been charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the

F Act') for trafficking 19,635 grams of cannabis, together with Salleh Zakaria the co-accused, in a car carrying false plate number PAG 312 at a police roadblock at Tanah Merah, Kelantan. The respondent was acquitted in the High Court on grounds that the prosecution had failed to establish possession of the drugs; the drugs

G were recovered from a stolen vehicle; there was no established nexus between the respondent and Salleh Zakaria except that they were together in the car at the time of arrest; the respondent was a mere passenger at the time of arrest and never the owner or hirer of that vehicle; custody, control and possession of the drugs remained

H unproved, let alone that he had acted jointly with Salleh Zakaria.

Held (dismissing the appeal by the prosecution)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

I **(1)** The substantive charge was of trafficking the dangerous drugs, a charge which may be proved by direct evidence or by invoking the presumption provision, subject to there being no allusion to another presumption provision in order to establish the

ingredient of possession (*Muhammad Hassan v. PP*). Much depends on direct evidence to establish the ingredient of possession, an ingredient that requires the successful establishment of the physical and mental elements. (paras 10 & 12)

(2) The term 'physical' does not mean that one must physically clasp the package or container that holds the drugs, but suffice that one knows where they are and can dispose of them whenever the need arises. At all material time, the vehicle was controlled by Salleh Zakaria whilst the respondent was a mere passenger. The prosecution never adduced any evidence to show whether the respondent knew of the presence of the drugs in the vehicle. The failure to call the sales agent, a person who could clarify whether the respondent or the co-accused had bought the vehicle, did no favours to the prosecution's case. The vehicle also carried a false plate number, it could imply that the occupants of the vehicle had stolen it, without knowing the deleterious items hidden in it. There was no evidence of when the respondent entered the car, and whether he at all helped to hide the packages in the two impugned areas of the vehicle. With no evidence confirming the physical element especially with the respondent never on the wheel, the prosecution thus had failed to establish custody and control of the drugs. (paras 13, 14, 15 & 16)

(3) Knowledge, which is necessary to establish possession and thus implying awareness of their whereabouts, unless admitted, could only be proved by inference from the surrounding circumstances. This appeal was not a simple case of a person holding a bag that contained drugs, for which some explanation may be demanded of him, with its proximity giving a strong inference of knowledge, but made complicated by the simple fact of being arrested in a car. No doubt the drugs were a few feet away from the respondent, but as they were hidden and out of sight, those drugs could have just been a thousand miles away; an immeasurable distance for someone without the requisite knowledge. Unless the rear passenger seat was deliberately ripped apart or the bonnet opened, no uninitiated passenger would have been aware of the drugs. (para 18)

(4) The conduct of an accused person may also be the source of knowledge of whether he knew of the drugs. SP12's testimony that 'Shamsuddin nampak ceria kerana menyanyi' and 'lesen memandu Salleh tiada dijumpai. Dia tidak kelihatan dalam keadaan takut semasa ditahan' was admissible and relevant. The inference from such testimony was that at the time of the arrest, the respondent did not show any element of fear. The conduct of both of them could only benefit the respondent's case as it negatived any inference of knowledge of the drugs from either of them especially the respondent. With no evidence of fear adduced, let alone there was no attempt to escape or a struggle put up against the police, the prosecution had failed to establish any inference knowledge of the drugs in the car. Without that knowledge, let alone there was a failure to establish custody and control, the prosecution must have failed to establish the ingredient of positive possession by direct evidence. (paras 19, 21 & 22)

(5) The prosecution had failed to establish that the respondent could be said to be in a position to freely deal with the drugs hidden in the engine and under the rear passenger seat like an owner, to the exclusion of others. As the prosecution had depended on s. 37(da) of the Act *ie*, by presumption to establish the ingredient of trafficking, what without any positive possession established, the decision of the learned judge to acquit the respondent at the prosecution's stage was unassailable. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh pihak pendakwaraya terhadap keputusan Hakim Mahkamah Tinggi, yang telah membebaskan dan melepaskan kedua-dua tertuduh di akhir kes pendakwaan. Pihak tertuduh pertama (yang dirujuk sebagai Salleh Zakaria) tidak menghadirkan diri di mahkamah untuk rayuan. Mahkamah ini meneruskan dengan rayuan terhadap responden kedua (yang dirujuk sebagai responden). Faktanya adalah bahawa responden dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('the Act') atas kesalahan mengedar 19,635 gram kanabis, bersama-sama dengan Salleh Zakaria, pihak tertuduh pertama, di dalam sebuah kereta yang membawa plet nombor palsu PAG 312 di satu sekatan jalan polis di Tanah Merah, Kelantan. Responden telah dilepaskan di Mahkamah Tinggi atas

alasan-alasan bahawa pihak pendakwaraya telah gagal membuktikan milikan dadah oleh responden kedua; dadah-dadah telah dijumpai di dalam kereta yang dicuri; tidak terdapat nexus di antara responden dan Salleh Zakaria selain daripada fakta bahawa mereka berdua berada di dalam kereta tersebut pada masa polis menahan mereka; responden hanyalah penumpang pada masa mereka ditahan dan bukan pemilik atau penyewa kereta tersebut; jagaan, kawalan dan milikan dadah-dadah tersebut oleh responden tidak terbukti, apatah lagi responden bertindak bersama-sama dengan Salleh Zakaria.

Diputuskan (menolak rayuan pihak pendakwaraya)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Pertuduhan substantif adalah pengedaran dadah berbahaya, satu pertuduhan yang boleh dibuktikan oleh keterangan langsung atau dengan menggunakan peruntukan anggapan, tertakluk kepada keadaan di mana tiada rujukan dibuat ke peruntukan anggapan yang lain dalam membuktikan ingredian milikan (*Muhammad Hassan v. PP*). Banyak bergantung ke atas keterangan langsung untuk membuktikan ingredian milikan, sesuatu ingredian yang memerlukan kejayaan pembuktikan elemen-elemen fizikal dan mental.

(2) Terma 'fizikal' tidak bermakna bahawa seseorang mesti memegang secara fizikal bungkusan atau bekas yang mengandungi dadah-dadah, tetapi adalah mencukupi bahawa seseorang mengetahui di mana bahan-bahan itu dan boleh menghapuskannya apabila perlu. Pada masa yang material, kenderaan tersebut dikawal oleh Salleh Zakaria dan responden hanya penumpang. Pihak pendakwaraya tidak mengemukakan keterangan yang menunjukkan sama ada responden berpengetahuan mengenai kehadiran dadah-dadah tersebut di dalam kenderaan. Kegagalan memanggil ejen jualan, seseorang yang boleh menjelaskan sama ada responden atau pihak tertuduh pertama telah membeli kenderaan tersebut, tidak menolong kes pendakwaan langsung. Kenderaan juga membawa plet nombor palsu, secara tersirat menunjukkan bahawa sesiapa yang berada di dalam kenderaan itu mungkin telah mencurinya, tanpa pengetahuan bahawa dadah-dadah berbahaya tersembunyi di dalam kenderaan tersebut. Tidak terdapat keterangan bila responden telah memasuki kenderaan tersebut, dan sama ada beliau telah menolong menyembunyikan bungkusan-bungkusan

di dalam dua bahagian-bahagian kenderaan tersebut. Tanpa keterangan yang boleh membuktikan elemen fizikal lebih-lebih lagi dengan responden yang tidak berada di kerusi pemandu, pihak pendakwaan gagal membuktikan jagaan dan kawalan dadah-dadah tersebut.

(3) Pengetahuan, yang diperlukan untuk membuktikan milikan dan menunjukkan kesedaran di mana bahan-bahan tersebut berada, melainkan pengakuan dibuat, hanya boleh dibuktikan melalui inferens dari keadaan-keadaan sekeliling. Rayuan ini bukan kes yang ringkas mengenai seseorang yang memegang bag yang mengandungi dadah-dadah berbahaya, di mana penjelasan boleh dituntut darinya, dengan kehampirannya memberi inferens pengetahuan yang kuat, tetapi dibuat sukar oleh kerana beliau ditahan di dalam kenderaan. Memang dadah-dadah tersebut berhampiran dengan responden, tetapi kerana ia disembunyikan dan tidak dapat dilihat, dadah-dadah tersebut boleh dikatakan berjauhan; jarak yang agak jauh bagi sesiapa yang tidak mempunyai pengetahuan yang diperlukan. Melainkan kerusi penumpang dikoyakkan atau hud dibuka, penumpang yang bersahaja tidak akan mempunyai pengetahuan mengenai dadah-dadah itu.

(4) Tindakan seseorang yang dituduh mungkin boleh menjadi sumber pengetahuan sama ada beliau tahu mengenai dadah-dadah tersebut. Testimoni SP12 bahawa "Shamsuddin nampak ceria kerana menyanyi" dan "lesen memandu Salleh tiada dijumpai. Dia tidak kelihatan dalam keadaan takut semasa ditahan" adalah diterima dan relevan. Inferens yang dibuat oleh testimoni itu adalah pada masa tahanan dibuat, responden tidak menunjukkan apa-apa elemen ketakutan. Tindakan-tindakan kedua-dua tertuduh memanfaatkan kes responden kerana ia tidak membuktikan inferens pengetahuan dadah-dadah tersebut daripada mereka terutama sekali responden. Tanpa pengemukaan elemen ketakutan, apatah lagi tiada percubaan untuk melarikan diri atau bergelut dengan pihak polis, pihak pendakwaan telah gagal membuktikan inferens pengetahuan dadah-dadah di dalam kenderaan itu. Tanpa pengetahuan tersebut, apatah lagi kegagalan menunjukkan jagaan dan kawalan, pihak pendakwaan telah gagal membuktikan ingredian milikan positif melalui keterangan langsung.

(5) Pihak pendakwaan telah gagal membuktikan bahawa responden berada dalam keadaan bebas untuk mengendalikan dadah-dadah yang tersembunyi di dalam enjin dan di bawah kerusi penumpang seperti pemilik, tidak termasuk yang lain. Pihak pendakwaan telah bersandarkan atas s. 37(da) Akta tersebut, iaitu dengan anggapan untuk membuktikan ingredian pengedaran, tanpa pembuktikan milikan positif, keputusan hakim untuk membebaskan responden di peringkat pendakwaan tidak dapat disangkal.

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
DPP v. Merriman [1972] 3 All ER 42 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 SC ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 170
Dangerous Drugs Act 1952, ss. 2, 37(da), 39B(1)(a)

For the appellant - Fatnin Yusof; AG's Chambers
For the respondent - Manjeet Kaur; M/s Naran Singh & Co

[Appeal from High Court, Kota Bharu; Criminal Trial No: 45-8-1996]

[Editor's note: For the High Court judgment, please see PP lwn. Salleh Zakaria & Satu Lagi [2008] 7 CLJ 193.]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar JCA:

[1] This was an appeal by the prosecution against the decision of the learned High Court judge, who had acquitted and discharged both accused persons at the end of the prosecution's case. The notice of hearing was served on the first co-accused person (hereinafter merely referred to as Salleh bin Zakaria) but had not appeared before us for the appeal. This panel thereupon issued a

warrant of arrest against him. With the notice of hearing served on the second respondent (thenceforth merely referred to as the respondent), and with the agreement of the learned Deputy Public Prosecutor, we proceeded with the appeal against him. At the end of the hearing, we dismissed the appeal by the Public Prosecutor.

[2] The respondent had been charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) for trafficking 19,635 grams of cannabis, together with one Salleh bin Zakaria the co-accused, in a car carrying false plate number PAG 312 at a police roadblock at Lalang Pepuyu, Tanah Merah, Kelantan. The facts are as follows. Acting on information SP10 (detective corporal Syed Hashim), on the night of 27 September 1995 together with a team of police personnel had set up an observatory post near Masjid Kampong Rahmat, Tanah Merah, Kelantan. At about 8.10pm he saw a car entering the rear section of the mosque through a lane. He heard the opening of two car doors followed by the sound of the bonnet shut closed. He then saw a figure exiting the lane going towards the main road and thereafter crossing it. SP10 then saw the vehicle similarly exiting from the lane. It was at this stage that he saw the vehicle registered as PAG 312. He only saw one person in that car ie, the driver. He then witnessed the person outside the vehicle re-enter the car. About 3 to 4 minutes later the vehicle drove off. This witness never identified the identity of any of those actors. The information regarding the car was forthwith communicated to SP11 via the walkie-talkie. SP11 trailed that vehicle for six kilometres until the car reached a roadblock at Lalang Pepuyu, Tanah Merah. At the roadblock, SP12 together with his team stopped the vehicle ie, of a Nissan Stanza make. The driver was identified as Salleh bin Zakaria whilst the respondent was seated at the front passenger seat. After an initial cursory inspection, he found nothing. He later, on further inspection of the vehicle, found a transparent purple package containing 15 smaller transparent packages at the engine area, suspected to be cannabis. Five more similar like packages were recovered under the cushion of the rear passenger seat. Through the chemist it was confirmed that the twenty packages contained cannabis weighing 19,635 grams. In this car was also recovered the respondent's mobile phone and a Hotel Tokyo Baru payment receipt in his name. The prosecution adduced evidence through SP5, an employee of Hotel Tokyo Baru that on 26 September 1995 ie, a day earlier, a person called Syamsuddin bin

Ramli was registered in that hotel. He issued a receipt for payment received. Another witness ie, SP4, testified that he issued a parking ticket for vehicle PAG 312 which was parked in front of the said hotel.

[3] The prosecution also adduced evidence, which disclosed that the registration number PAG 312 came from a Honda Accord owned by SP7. The latter admitted that the road tax disc for that vehicle was lost some time in July 1995. The detained vehicle (Nissan Stanza), owned by SP6 until April 1995 was originally registered as BBG 7869. This witness stated that he handed over this Nissan Stanza to a car sales' agent and had it sold. Regretfully the name change had yet to take place.

[4] As stated earlier the learned judge acquitted the respondent at the end of the prosecution's case. The grounds of appeal submitted by the prosecution were that:

i. the respondent was a passenger of PAG 312 at the time of arrest;

ii. he was observed to be in the car for some time;

iii. he was involved in 'some happening' before arriving at the mosque;

iv. the vehicle carried a false plate;

v. the discovery of the hotel bill in the vehicle indicated his connection with it; and

vi. the evidence showed of the respondent's intention to act jointly with Salleh bin Zakaria.

[5] The acquittal was premised on the grounds, *inter alia* that:

i. the prosecution had failed to establish possession of the drugs;

ii. the drugs were recovered from a stolen vehicle;

iii. SP10 did not see who drove the stolen vehicle when it was at Masjid Kg. Rahmat;

iv. he too did not see what happened at the rear of that mosque as it was dark;

A v. that the sound of doors and bonnet of the vehicle being closed was based on assumptions;

vi. there was no certainty whether Salleh Zakaria was together with the respondent at Hotel Tokyo Baru, or whether they stayed in
B it, as he was not registered as a guest;

vii. there was no established nexus between the respondent and Salleh Zakaria except that they were together in the car at the time of arrest;

C viii. the respondent was a mere passenger at the time of arrest and never the owner or hirer of that vehicle;

ix. the receipt and mobile telephone merely establish that he was in that car at that relevant date; and

D x. custody, control and possession of the drugs remained unproved, let alone he had acted jointly with Salleh bin Zakaria.

[6] For ease of reference I reproduce a portion of the grounds of judgment as regards the respondent. It is as follows:

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> Kedudukan Tertuduh 2 tidak berbeza. Keterangan yang ada hanya membuktikan dia sebagai penumpang kereta PAG 312 semasa ditahan. Dia bukan tuan punya kereta itu dan tidak dibuktikan sebagai penyewa atau peminjamnya, oleh itu tidak mempunyai jagaan atau kawalan ke atasnya. Perjumpaan telefon bimbitnya dan
> F resit hotel di dalam kereta itu tidak lebih daripada menunjukkan yang dia pernah menaikinya yang disahkan dengan kehadirannya sebagai penumpang semasa kereta itu ditahan.
>
> Anggapan mengedar di bawah seksyen 37(da) ADB hanya
> G berbangkit jika Tertuduh 2 buktikan memiliki dadah tersebut. Di sini tidak ditunjukkan yang Tertuduh 2 sedar atau tahu tentang kehadiran dadah tersebut di dalam kereta yang dinaikinya. Walau pun dia dibuktikan berada dekat masjid Kampong Rahmat pada malam itu, apa yang berlaku di belakang masjid tidak diketahui dan kerlipan api daripada lighter yang dikatakan sebagai isyarat boleh
> H membawa berbagai inferens kerana tiada lighter dijumpai. Tiada keterangan boleh menunjukkan yang Tertuduh 2 tahu yang dadah tersebut tersorok dicelah engin atau di bawah kusyen belakang kereta kerana ia tidak boleh dilihat dengan mata kasar oleh sesiapa yang menaiki kereta itu. Juga tidak dibuktikan niat bersama-sama
> I Tertuduh 2 dan Tertuduh 1 untuk mengedar dadah yang dijumpai.

[7] As indicated above the respondent was initially jointly charged with Salleh bin Zakaria for the abovementioned offence of trafficking. There was no flaw in this course of action as it was of the same action against the two of them. There was proximity of time, place, supposed continuity of action and community of purpose here. Despite the fact that we did not hear this appeal together with the appeal against Salleh bin Zakaria, the appeal against the respondent did not terminate forthwith. It must be understood that as he was jointly charged with Salleh, a choice permitted by s. 170 of the Criminal Procedure Code, each and every ingredient against him must still be satisfied first, before a conviction could be obtained against him irrespective of the outcome to the co-accused. The outcome to the respondent thus, be it a conviction or acquittal, is independent of the outcome to his co-accused. Visu Sinnadurai J in *PP v. Muhamad Nasir Shaharuddin & Anor* [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 had occasion to say:

> The important feature of a joinder of two or more accused is that each may be acquitted or convicted of independently committing the offence which is the subject matter of the joint charge.

[8] In *DPP v. Merriman* [1972] 3 All ER 42 the House of Lords said:

> All crime is personal and individual though there may be some crimes … which can only be committed in co-operation with others. The fact that in one count of an indictment it is set out that A and B wounded C does not warrant the conviction of either A or B unless individual guilt is established.

[9] To reiterate, the supposed commission of an offence by the respondent is a distinct offence, and his conviction may be attained if there is sufficient evidence to establish his guilt. The postponement of the appeal against Salleh bin Zakaria by us in order for the prosecution to execute the warrant of arrest thus was of no procedural consequence against the respondent, hence our continuance of the appeal.

[10] The substantive charge was of trafficking the dangerous drugs, a charge which may be proved by direct evidence or by invoking the presumption provision, subject to there being no allusion to another presumption provision in order to establish the ingredient of

A possession (*Muhammed Hassan v. PP* [1998] 2 CLJ 170). With such a large amount recovered ie, 18,879.1 grams of cannabis, the evidential provision of s. 37(da) of the Act may safely be invoked, as by no figment of the imagination may that amount be for personal consumption (*Ong Ah Chuan v. PP* [1980] 1 LNS 181). In
B fact, the learned Deputy Public Prosecutor too admitted at the High Court that his route towards establishing the ingredient of trafficking was by the allusion to the latter presumption provision (see p. 112 of rekod rayuan). Verbatim, the learned DPP said:

C > Saya setuju anggapan di bawah s. 37(d), (g), & (h) tidak terpakai dalam kes ini seperti nas Syed Hamid. Pendakwa berasaskan anggapan s. 37(da).

[11] It was obvious from the submission of Salleh bin Zakaria at the High Court, and that of the respondent who had adopted the
D former's submission, both had broached the ingredient of trafficking on the premise that the prosecution had alluded to the presumptive provision (p. 110 of the rekod rayuan). Thus, after deliberately restricting his evidential mobility to that of the presumptive provision, for the learned DPP to complain before us that the
E learned judge had failed to use s. 2 of the Act for the prosecution's benefit, not only was improper but would catch the respondent on the wrong foot.

[12] With the rule against double presumption militating against
F the prosecution, much depends on direct evidence to establish the ingredient of possession, an ingredient that requires the successful establishment of the physical and mental elements. So where is the evidence that could prove beyond reasonable doubt that ingredient? Lord Wilberforce in *Warner v. Metropolitan Police Commissioner* [1968]
G 2 All ER 356 on the issue of possession had opined that 'the starting point will be that the accused had physical control of something-a package, a bottle, a container-found to contain the substance'. Can the court arrive at a finding of fact that the prosecution had established that physical control factor?

H

[13] Let us scrutinize the evidence first as regards this 'physical' element ie, whether the respondent at anytime had custody and control of the drugs found in the engine section and under the rear passenger seat. For clarification purposes, the term 'physical' does
I not mean that he must physically clasp the package or container that holds the drugs, but suffice that he knows where they are and

can dispose of them whenever the need arises. Returning to the facts here, at all material time, the vehicle was controlled by Salleh bin Zakaria whilst the respondent a mere passenger. The prosecution never adduced any evidence to show whether the respondent knew of the presence of drugs in the vehicle.

[14] The failure to call the sales agent, a person who could clarify whether the respondent or the co-accused had bought the vehicle, did no favours to the prosecution's case. Could that agent have been the actual owner of the drugs, with the respondent and Salleh bin Zakaria being mere innocent carriers? Bearing in mind that the vehicle carried a false plate number, it could also imply that the occupants of the vehicle had stolen it, without knowing the deleterious items hidden in it. If either one had been the buyer of the vehicle why affix a false plate number?

[15] Even at the vicinity of the mosque, there was no positive testimony to establish that the police knew what transpired there especially with the area being pitched dark. There was no evidence of when the respondent entered the car, and whether he at all helped to hide the packages in the two impugned areas of the vehicle. In fact the learned judge in no uncertain terms had said:

> Dadah tersebut terletak ditempat yang tersorok daripada pandangan sesiapa yang menaiki kereta itu. Tiada diketahui siapa dan bila dadah tersebut diletak disitu.

[16] With no evidence confirming the physical element especially with the respondent never on the wheel, the prosecution thus had failed to establish custody and control of the drugs.

[17] We now touch on the mental aspect. It would defy logic if the respondent could traffic those drugs when he had no power of disposal over them. Power of disposal in this context means he knew of their whereabouts and could deal with them as if they were his own (*Chan Pean Leon v. PP* [1956] 1 LNS 17). Knowledge, which is necessary to establish possession and thus implying awareness of their whereabouts, unless admitted, could only be proved by inference from the surrounding circumstances (*Warner v. Metropolitan Police Commissioner (supra)*). Even in the above case of *Chan Pean Leon v. PP*, the court had opined:

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.

[18] This appeal is not a simple case of a person holding a bag that contains drugs, for which some explanation may be demanded of him, with its proximity giving a strong inference of knowledge, but made complicated by the simple fact of being arrested in a car. Cars have many parts and components and with nooks and corners to hide any dangerous item from any inquisitive eyes. Criminals, to ensure the success of their criminal enterprise, may even construct hidden compartments. This case is no different to many previous ones where drugs have been recovered from cars and, if not for the vigilance of police, would have remained undiscovered. No doubt the drugs were a few feet away from the respondent, but as they were hidden and out of sight, those drugs could just have been a thousand miles away; an immeasurable distance for someone without the requisite knowledge. Unless the rear passenger seat was deliberately ripped apart or the bonnet opened, no uninitiated passenger would have been aware of the drugs. The failure to discover the drugs when the police made an initial cursory search in the boot or in the passenger section lends credence to the last statement (rekod rayuan 58).

[19] The conduct of an accused person may also be the source of knowledge of whether he knew of the drugs. The prosecution through SP12, as found at p. 59 of the rekod rayuan, attempted to adduce evidence of the contributive conduct of the respondent at the place of arrest. This witness who played a major role in the arrest of the respondent had taken up position at the roadblock where the Nissan Stanza, with the false plate number was detained. He initially identified the respondent as the driver. His evidence at p. 59 reads as follows:

> Semasa saya mengarah bonet hadapan dibuka, saya dengan jelas melihat pemandu iaitu Shamsuddin tiba-tiba mukanya berpeloh. Peloh kasar dan jelas saya dapat lihat – sebelum itu dia dalam keadaan biasa Salleh juga dalam keadaan yang gelisah.

[20] Later at p. 69 of the rekod rayuan, SP12 took a different stance when he said:

> Semasa mula-mula ditahan kedua Tertuduh nampak dalam keadaan biasa – Shamsuddin nampak ceria kerana dia menyanyi. Dia dalam keadaan berpeluh apabila saya mengarahkan anggota saya membuka bahagian enjin. Semasa ditahan Salleh yang memandu kereta. Saya ada pinta lesen memandu Salleh dalam dompetnya. Sekarang saya kata lesen memandu Salleh tiada dijumpai. Dia tidak kelihatan dalam keadaan takut semasa ditahan.

[21] No explanation was given for this change of stance. SP13 who took part in the exercise confirmed that Salleh bin Zakaria was the driver. From his confirmation, the panel accepted either that a typographical error or a slip of the tongue by SP12 had occurred as regards the name. In fact it was the prosecution's approach that the driver was Salleh bin Zakaria. With such a concession, SP12's testimony that "Shamsuddin nampak ceria kerana menyanyi" and "… lesen memandu Salleh tiada di jumpai. Dia tidak kelihatan dalam keadaan takut semasa ditahan" is admissible and relevant. The inference from such testimony is that at the time of arrest the respondent did not show any element of fear. The conduct of both of them could only benefit the respondent's case as it negatived any inference of knowledge of the drugs from either of them especially the respondent.

[22] With no evidence of fear adduced, let alone there was no attempt to escape or a struggle put up against the police, we were satisfied that the prosecution had failed to establish by inference knowledge of the drugs in the car. Without that knowledge, let alone there was failure to establish custody and control, the prosecution must have failed to establish the ingredient of positive possession by direct evidence. To regurgitate our factual findings, this panel was satisfied that the prosecution had failed to establish that the respondent could be said to be in a position to freely deal with the drugs hidden in the engine and under the rear passenger seat like an owner, to the exclusion of others. As the prosecution had depended on s. 37(da) of the Act ie, by presumption to establish the ingredient of trafficking, what without any positive possession established, the decision of the learned judge to acquit the respondent at the prosecution's stage was unassailable.

[23] Based on the above grounds we had no hesitation in dismissing the prosecution's appeal.